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No. 85-

In The

Supreme Court of the United States

October Term, 1985

ROBERT JOHN WINICKI and
ANDREW ALEXANDER STRAUSS,

on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT A. MALLARD, individually and in his capacity as the Property Appraiser of Duval County, Florida,

on behalf of himself and all others similarly situated;

LYNWOOD ROBERTS, individually and in his capacity as the Tax Collector of Duval County, Florida,

on behalf of himself and all others similarly situated;

RANDY MILLER, individually and in his capacity as the Executive Director of the Department of Revenue of the State of Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does the judicially created equitable principle of comity, announced by this Court in *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100 (1981), bar the petitioners from asserting in federal district court a 42 U.S.C. § 1983 damage action, based upon a facial attack on a state taxing statute which has been both judicially and legislatively repealed, when no state damage remedy is available?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 783 F.2d 1567 (11th

Cir. 1986) (Appendix A). The opinion of the United States District Court for the Middle District of Florida is reported at 615 F.Supp. 1244 (M.D. Fla. 1985) (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on March 13, 1986 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1341 of Title 28 of the United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

STATEMENT OF THE CASE

On July 7, 1982, two Florida homeowners brought suit on behalf of themselves and all others similarly situated (the "Taxpayers") against sixty-seven county tax appraisers and tax collectors, individually and in their official capacities (the "Counties"), located throughout Florida. The Taxpayers alleged that the Counties had violated their federal constitutional rights through the enforcement of Florida Statute § 196.031(3)(d)-(e) (1981) (the "Homestead Exemption Statute"). The Taxpayers sought redress for damages in excess of three hundred million dollars pursuant to 42 U.S.C. § 1983.

The United States District Court for the Middle District of Florida dismissed the action based on the principle of comity as expressed in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), and for lack of jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341. The United States Court of Appeals for the Eleventh Circuit affirmed on the basis of the principle of comity and did not address the Tax Injunction Act issue.

The Homestead Exemption Statute, enacted in 1980, provided for a homestead property tax exemption of $25,000 for homeowners who had been permanent residents of the State of Florida for the five consecutive years prior to claiming an exemption. The Taxpayers, over three hundred thousand individuals, alleged that such a durational residency requirement impaired the fundamental right to travel from other states to Florida and created two classes of residents in Florida, those who had been residents for five consecutive years and those who had not. They also alleged that the five year residency requirement

discriminated against older individuals who, because of their age, have a shorter expected life span and who moved into the State of Florida for retirement. Finally, the Taxpayers contended that the requirement restricted the movement of goods and persons among the states. *Winicki v. Mallard*, 783 F.2d 1567, 1568 (11th Cir. 1986).

At once, before any taxes were collected, the Homestead Exemption Statute came under federal constitutional attack by homeowners who had resided in Florida for less than five consecutive years. A class action suit was filed in the Orlando Division of the United States District Court for the Middle District of Florida. The court dismissed this class action on the basis that the plaintiffs had a plain, speedy and efficient remedy in the Florida state courts. *Osterndorf v. Turner*, 505 F.Supp. 175 (M.D. Fla. 1981). Later, suits were filed in the Florida state courts. The state court action filed by Osterndorf eventually found its way to the Florida Supreme Court in late 1982. On December 16, 1982, the Florida Supreme Court ruled that the Homestead Exemption Statute violated the equal protection clause of the Florida Constitution. *Osterndorf v. Turner*, 426 So.2d 539, 544 (Fla. 1982). The Florida Supreme Court expunged the statutory language which required a homeowner to be a resident for five consecutive years before qualifying for the exemption. The court did so only on a prospective basis beginning with the taxable year commencing January 1, 1983, except for those taxpayers (three in number) who had timely judicially challenged the residency requirement in state court prior to the date of the rendition of the court's decision. *Id.* at 545. The Florida Supreme Court, however, refused to rule on the federal claims presented in the case. *Id.* at 544. In 1984,

the Florida Legislature amended the Homestead Exemption Statute to remove the durational residency requirement. Chapter 84-327 § 2, Laws of Florida.

After the rendition of the *Osterndorf* decision by the Florida Supreme Court, the Taxpayers continued to seek a section 1983 damage remedy in federal district court because there was no state remedy available for the refund of over three hundred million dollars collected from them under the Homestead Exemption Statute. *Winicki v. Mallard*, 783 F.2d at 1568-69. On August 16, 1985, the district court dismissed the Taxpayers' complaint and applied the comity doctrine because "a refund would have an impact on the fisc of the State of Florida. With a purported class of 300,000 individuals, a damage remedy could well exceed $150,000,000. A more chilling effect upon the fiscal operations of state government cannot be imagined." *Winicki v. Mallard*, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985). On March 13, 1986, the court of appeals affirmed finding that:

> The damages sought here are a refund of taxes collected under a state statute prior to its invalidation. Even though a state statute has been declared unconstitutional and is no longer operational, the principles of federalism upon which the comity doctrine rests require federal courts to show restraint where retroactive relief is being sought.
>
> The district court appropriately refused to engage in a post hoc evaluation of Florida's resolution of the controversial tax statute, recognizing that the proper relation of the federal forum to that of the state in this most critical area of state operations is governed by the principle of comity.

Winicki v. Mallard, 783 F.2d at 1571 (footnotes omitted).

Neither the district court nor the court of appeals mentioned in their decisions that there has never been a ruling on the merits of the Taxpayers' federal constitutional claims that the five year durational residency requirement of the Homestead Exemption Statute violated their right to travel among the states and their right to equal protection. The Florida Supreme Court in the *Osterndorf* decision specifically refused to rule on the federal constitutional issues. *Osterndorf v. Turner,* 426 So.2d at 544. In addition, when one of the Taxpayers filed a state court action seeking to enjoin the enforcement of the Homestead Exemption Statute under section 1983 and sought an award of attorney's fees, the Florida appellate courts again specifically refused to rule on the merits of his federal constitutional claims. *Mallard v. Winicki,* 436 So.2d 926 (Fla.App.Ct. 1983); *Winicki v. Mallard,* 441 So.2d 693, 695 (Fla.App.Ct. 1983), *cert. denied,* 465 U.S. 1027 (1984).

In summary, despite the filing of a federal class action before any taxes were collected by the Counties, the Counties collected and have been allowed to keep over three hundred million dollars in taxes collected under an illegal statute. The federal courts have refused to provide a forum for the Taxpayers to litigate their right to a federal damage remedy under section 1983.

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REASONS FOR ALLOWING THE WRIT

This case involves the question of whether the judicially created equitable principle of comity may bar the Taxpayers from asserting in federal district court a section 1983 damage remedy action, based upon a facial attack on a state taxing statute which has been both judicially and legislatively repealed, when no state damage remedy is available.

The instant case provides this Court with an opportunity to explain the extent to which the judicially created equitable principle of comity may override Congress' explicit assignment of jurisdiction to the federal courts over a class of damage actions brought pursuant to section 1983.

It is important that this Court grant the writ and correct the fundamental error of the court of appeals in its application of the principle of comity to state tax matters. As the court of appeals decision now stands, a state is free to pass tax legislation which violates federal constitutional rights on a massive scale (over $300,000,000 in damages) without ever having to concern itself with the possibility of the imposition of a damage remedy either under section 1983 by a federal court or under state law by a state court.

The Taxpayers argued that the principle of comity does not apply where no interference with state taxation can result. The court of appeals disagreed finding that the comity doctrine as enunciated in *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100 (1981), should not be so narrowly read. *Winicki v. Mallard,* 783 F.2d at 1571. Even though the Taxpayers had been unable to obtain a ruling from any court on the mer-

its of their federal constitutional claims, the court of appeals held that the comity doctrine barred their action.

In *Fair Assessment,* this Court addressed the issue of "whether a damages action may be brought under 42 U.S.C. § 1983 to redress the allegedly unconstitutional administration of a state tax system." *Fair Assessment,* 454 U.S. at 101. Five members of this Court concluded that "despite the ready access to federal courts provided by *Monroe* and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116. Four other members of this Court, Justices Brennan, Marshall, Stevens and O'Connor, were of the opinion that the federal courts could never renounce jurisdiction under the principle of comity where Congress had expressly conferred it upon them. *Id.* at 117, 123-24 (Brennan, J., concurring in judgment).

This Court in *Fair Assessment* explained the principle of comity as follows:

> . . . the doctrine of equitable restraint was of "notable application," *Boise Artesian Water Co., supra,* at 281, and carried "peculiar force," *Matthews, supra,* at 525, in suits challenging the constitutionality of state tax laws. Such restraint was particularly appropriate because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court. As the Court in *Matthews* explained:
>
> > "The reason for this guiding principle [of equitable restraint] is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a

> different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." 284 U.S. at 525.

Thus, in 1909 we could state that "[a]n examination of the decisions of this court shows that *a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.*" *Boise Artesian Water Co., supra,* at 282.

. . . .

The post-Act vitality of the comity principle is perhaps best demonstrated by our decision in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Several Louisiana taxpayers brought an action in Federal District Court seeking a declaratory judgment that the state tax law as applied to them was unconstitutional and void. Although § 1341 was raised as a possible bar to the suit, as it has been raised in this case, "we [found] it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax." 319 U.S., at 299. Instead, "we [were] of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require[d] a like restraint in the use of the declaratory judgment procedure." *Ibid.* Those considerations were, of course, principles of federalism:

> " 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and *necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer . . .*" *Id.*, at 298 (quoting *Matthews v. Rodgers*, 284 U.S., at 525).
>
> The Court's reliance in *Great Lakes* upon the necessity of federal-court respect for state taxing schemes demonstrates not only the post-Act vitality of the comity principle, but also its applicability to actions seeking a remedy other than injunctive relief. The focus was not on the specific form of relief requested, but on the fact that "*in every practical sense* [*it*] *operate*[*d*] *to suspend collection of the state taxes until the litigation* [*was*] *ended.*" 319 U.S., at 299. As will be seen below, the relief sought in this case would have a similarly disruptive effect.

Fair Assessment, 454 U.S. at 108-11 (emphasis added).

This Court noted two requirements for application of the principle of comity in state tax matters. First, interference with state fiscal operations, by effectually suspending the collection of state taxes until the federal litigation was complete, must be present. Second, the federal right must be preserved.

This Court's application of the principle of comity has always been with respect to state tax statutes under which

the state was currently collecting taxes for its fisc. The Taxpayers argued that the comity doctrine is only to be applied in situations where state tax collection will be effectually restrained and does not apply when the tax statute at issue is no longer in force. *Winicki v. Mallard,* 783 F.2d at 1571. The plain language of the Tax Injunction Act requires that the plaintiff seek the "enjoin[ing], suspen[sion] or restrain[t] [of] the assessment, levy or collection of any tax by a federal district court" before federal jurisdiction may be ousted. "Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes . . ." *California v. Grace Brethren Church,* 457 U.S. 393, 411 (1983). The purpose of the Tax Injunction Act is "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 522 (1981). The damage remedy sought in the Taxpayers' action cannot "operate to suspend collection of the state taxes until the litigation is ended." *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 299 (1943) quoted in *Fair Assessment,* 454 U.S. at 111.

The Taxpayers argued that once the tax statute is no longer in existence, a section 1983 damage remedy has no greater impact upon the fisc of a local governmental unit of the state than any other damage award. In this particular case, the taxes were collected and retained by the Counties. *See Osterndorf v. Turner,* 426 So.2d at 545. The fact that a section 1983 damage award will have an impact on local government has been found to be insufficient to deny the explicit mandate of Congress in section 1983 to protect federal constitutional rights through a

monetary remedy against their violation by local governments. *Owen v. City of Independence,* 445 U.S. 622, 650-56 (1980); *see Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 690 (1978).

The second prerequisite for application of the comity doctrine is that the federal right must be preserved. This Court in *Fair Assessment* referred to this as "the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost." *Fair Assessment,* 454 U.S. at 116 n.8; *see Township of Hillsborough v. Cromwell,* 326 U.S. 620, 628 (1946). The Taxpayers argued that they had no state remedy and they were unable to obtain a ruling on the merits of their federal claims in state court. *Winicki v. Mallard,* 783 F.2d at 1571. While the district court and the court of appeals did imply that at one time Florida law provided for plain, speedy and efficient remedies for unconstitutional taxation, the Florida Supreme Court in *Osterndorf* removed these remedies for over three hundred thousand taxpayers when the court rendered its opinion on a prospective basis and refused to rule on the federal claims. *Id.* at 1568-69. The Taxpayers, despite over six years of litigation, have been unable to obtain a ruling on the merits of their federal constitutional claims. The Taxpayers are left without a remedy for over three hundred million dollars in damages they have suffered as a result of the Counties' violation of their federal constitutional rights.

Finally, the Taxpayers noted that this Court in *Fair Assessment* expressly reserved ruling on the issue of whether the principle of comity could ever apply to a

facial challenge to a state tax statute. The footnote stated:

> We need not decide in this case whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race.

Fair Assessment, 454 U.S. at 107 n.4.

The Taxpayers argued that a facial attack, unlike a challenge involving the application of a state tax statute, leaves no room for deference to the state courts or state administrative proceedings concerning interpretation of the tax statute at issue. The state courts or the state administrative proceedings cannot interpret the tax statute, as applied, in a manner which would render it constitutional. In a facial attack, the state statute either violates the Constitution or it does not.

In summary, the principle of comity is an equitable one created by the federal courts. It can never be used where its effect is to eliminate a federal remedy at law created by Congress.

———o———

CONCLUSION

If this Court does not grant the writ of certiorari, the Taxpayers will be denied any forum to obtain the redress afforded to them by section 1983 for the violations of their federal constitutional rights by the Counties.

Respectfully submitted,

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APPENDIX A

Robert John WINICKI, and Andrew Alexander Strauss, Plaintiffs-Appellants,

v.

Robert A. MALLARD, et al., Defendants-Appellees.

No. 85-3692.

United States Court of Appeals,
Eleventh Circuit.
March 13, 1986.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

Appellants, two Florida taxpayers, on behalf of themselves and all others similarly situated, sued various state and county officials, both individually and in their official capacities, including the property and tax collectors of Florida's sixty-seven counties, the Executive Director of the Department of Revenue, and the Attorney General, alleging violation of their federal constitutional rights by the enactment of Florida Statute Section 196.031(3)(d)-(e) (1981), the homestead tax exemption statute, and sought redress pursuant to 42 U.S.C. Section 1983. The district court, 615 F.Supp. 1244 (1985), dismissed the action based on the principle of comity as expressed in *Fair*

Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) and on the Tax Injunction Act, 28 U.S.C. Section 1341. We affirm.

The homestead exemption statute provided for an enhanced property tax exemption for homeowners who had been permanent residents of the State of Florida for five consecutive years prior to claiming an exemption. The taxpayers alleged that such a requirement impaired the fundamental right to travel from one state to Florida and created two classes of residents in Florida, those who had been residents for five consecutive years and those who had not. They also alleged that it discriminated against older individuals who, because of their age, have a shorter expected life span and who move into the State of Florida for retirement. It was also contended that the requirement restricted the movement of goods and persons among the states.

Originally, the taxpayers sought a declaratory judgment that the statute was in violation of the United States Constitution, an injunction prohibiting the enforcement of the five-year residence requirement, and damages to the class due to application of the requirement which would result in discriminatory taxation. At the time of dismissal of their complaint, the taxpayers had limited their prayer for relief to only a declaration of the statute's invalidity under the Federal Constitution and an award of damages under Section 1983. An injunction was no longer needed because in the interim the Florida Supreme Court had ruled that Section 196.031(3)(e) violated the equal protection clause of the Florida Constitution. *See Osterndorf v. Turner,* 426 So.2d 539 (Fla.1982). On rehearing, Section 196.031(3)(d) was also found to be

unconstitutional. The Florida legislature formally repealed the statute in 1984 (Section 2 of Laws, 1984, Ch. 84-327).

Appellants continue to seek Section 1983 relief because they claim that there is no state remedy available for the refund of several hundred million dollars collected under the statute before it was declared unconstitutional and collections were suspended. They emphasize that the *Osterndorf* decision was prospective only for the taxable year commencing January 1, 1983, and that it permitted only those taxpayers who had timely judicially challenged the applicability of this residence requirement in state court to be entitled to refunds. Appellants contend that this limitation denies access to an effective state remedy for the balance of the taxpayers.

Disposition of this controversy requires examination of two lines of authority which are somewhat dichotomous and which lead to different results. The first is represented by the principle of comity, and the second is represented by various decisions which have interpreted the scope of 42 U.S.C. Section 1983 (The Civil Rights Act of 1871).

The principle of comity has been described as "something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 20 S.Ct. 708, 710, 44 L.Ed. 856 (1900). For more than a century a series of decisions has injected a particular vitality into the principle of comity where operations of state tax systems have been challenged in federal courts. In *Dows v. Chi-*

cago, 11 Wall. 108, 78 U.S. 108, 20 L.Ed. 65 (1871), Mr. Justice Field noted that "it is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Id.* at 110, 78 U.S. at 110. In 1909 the Court concluded that "an examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Boise Artesian Water Co. v. Boise City,* 213 U.S. 276, 282, 29 S.Ct. 426, 428, 53 L.Ed. 796 (1909). The center of controversy continued to revolve around this "interference by prevention." In 1932 the Supreme Court was confronted with an appeal by Mississippi officials from the decree of a federal district court enjoining the collection of a state tax as an unconstitutional burden on interstate commerce. *Matthews v. Rodgers,* 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed 447 (1932). Writing for the court, Mr. Justice Stone cited Section 16 of the Judiciary Act of 1789 (later Rev.Stat. 723, 28 U.S.C. Section 384, Jud. Code Section 267), which declared that suits in equity should not be heard in federal courts in any case where there was a plain, adequate and complete remedy at law. *Id.* at 525, 52 S.Ct. at 219. "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States." *Id.* at 525-26, 52 S.Ct. at 219-20.

The principle of comity was not weakened or altered in 1937 by passage of 28 U.S.C. Section 1341, The Tax Injunction Act. The Act provides that:

> (t)he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The principle of comity was recognized to be so critical to effective operation of state taxing systems that Section 1341 served to strengthen this principle by formal, legislative sanction. "(T)he statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 97 S.Ct. 219, 222, 50 L.Ed.2d 227 (1976).

Neither the legislative history of Section 1341, nor its predecessor, 28 U.S.C. Section 1342, indicate that Congress intended to limit the scope of federal court restraint in state tax matters to the actions specified in those sections. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110, 102 S.Ct. 177, 183, 70 L.Ed.2d 271 (1981). In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), the Court clearly did not restrict the principle of comity to the actions enumerated in Section 1341. In *Great Lakes*, several Louisiana taxpayers sought a declaratory judgment in federal district court that a state tax law as it applied to them was unconstitutional and void. At that time the Court found it unnecessary to determine whether or not the Act should be construed to prohibit a declaration by federal courts concerning the unconstitutionality of a state tax

law. "(W)e are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedures." *Id.* at 299, 63 S.Ct. at 1073. It has recently been held that the Act also encompasses judicial restraint in granting declaratory relief. *California v. Grace Brethren Church,* 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). Thus, a narrow reading of the language of the Act serves merely as a partial embodiment of the broader notion of comity.

Against this setting, a second, and no less important, area is presented by 42 U.S.C. Section 1983 and decisions such as *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), which have interpreted its application. Section 1983 was enacted in the post-Civil War era to ensure state compliance with federal constitutional rights. It offers a federal cause of action to those able to prove violations of federal rights by anyone acting under color of state or local authority and makes the offending party "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." It has been held that it is not necessary to exhaust state remedies before resort to Section 1983 and the federal forum, thus making the federal remedy supplementary, not subservient to those of the state. *Monroe, supra,* at 183, 81 S.Ct. at 482; *see also Wilwording v. Swenson,* 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); *McNeese v. Board of Education,* 373 U.S. 668, 674, 83 S.Ct. 1433, 1437, 10 L.Ed.2d 622 (1963).

It is immediately apparent that these two lines of authority mandate different results in the state taxation

context where a "plain, speedy and efficient" state remedy is available to vindicate violations of federal rights. The Supreme Court confronted this incompatibility head on in *Fair Assessment in Real Estate v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). After noting that Section 1341 and the comity cases have precluded federal courts from granting injunctive and declaratory relief in state tax cases, the Court held "that taxpayers are barred by the principle of comity from asserting Section 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Id.* at 116, 102 S.Ct. at 186. By so holding, the Court resolved a conflict among the Courts of Appeals as to the proper relation between these two divergent doctrines. *See id.* at 102 n. 2, 102 S.Ct. at 179 n. 2. Thus, where a Section 1983 action is grounded in an allegation of an unconstitutional tax scheme, to survive dismissal the plaintiff must demonstrate that there is no plain, adequate, and complete state remedy available. The initial burden, then, is upon the plaintiff to make such a showing. Unless he is able to do so, the federal courts may properly refuse to entertain his Section 1983 action.

The district court in the instant case noted that "a review of available state remedies demonstrates that the plaintiffs have a choice of remedies under Florida law which are plain, adequate and complete." Moreover, the court observed that the vindication of the rights of those who timely judicially challenged the discriminatory statute in state court was proof that they had received a full hear-

ing and judicial determination in the Florida courts. Appellants contend, however, that the prospective ruling in *Osterndorf* effectively denies any remedy at all to those taxpayers who did not timely judicially file in state court unless the federal courts will open their doors as they are required to do under Section 1983. The question arises then why didn't the taxpayers bring a class action in state court.

Appellants' response is that they would have been required to file at least sixty-seven class action suits in sixty-seven counties to get relief, and that this would not have afforded them a plain, adequate and complete remedy. In view of the several hundred thousand members of the class and several hundred million dollars in question, we cannot agree with appellants that such a requirement effectively precluded them from enjoying a full hearing and judicial determination in the Florida courts. Appellants' position speaks not to the lack of such a remedy in state court but rather to the taxpayers' own cost-benefit analysis of the state remedy available at that time.

Appellants attempt to distinguish *Fair Assessment* by asserting that the comity doctrine only applies to situations where current operations of state tax systems are being challenged. Here, the tax operations in question have already been both judicially and legislatively repealed. Appellants maintain that a federal court need not concern itself with interfering in a state tax scheme which no longer exists and, therefore, is not to be bound by the restraint embodied in the principle of comity. The comity doctrine as enunciated in *Fair Assessment* should not be so narrowly read. "(D)amages actions, no less than actions for an injunction, would hale state officers

into federal court every time a taxpayer alleged the requisquisite elements of a Section 1983 claim. We consider such interference to be contrary to 'the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts.' " *Fair Assessment* at 115-16, 102 S.Ct. at 185-86 (citing *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (1932)). The damages sought here are a refund of taxes collected under a state statute prior to its invalidation. Even though a state statute has been declared unconstitutional and is no longer operational, the principles of federalism upon which the comity doctrine rests require federal courts to show restraint where retroactive relief is being sought.[1]

The district court appropriately refused to engage in a post hoc evaluation of Florida's resolution of the controversial tax statute, recognizing that the proper relation of the federal forum to that of the state in this most critical area of state operations is governed by the principle of comity.[2]

AFFIRMED.

---

1. In *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed. 2d 151 (1973), the Supreme Court denied taxpayers' request for retroactive relief and permitted the state of Pennsylvania to keep and disburse to third parties taxes collected under a statute which was subsequently declared to violate the Establishment Clause of the First Amendment. The Court has also refused retrospective relief where municipal financing was based on unconstitutional electoral procedures, *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed. 2d 523 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), and where local officials were elected under possibly discriminatory voting laws, *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

2. In view of our disposition of this case we need not reach the applicability vel non of the Tax Injunction Act.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3692
D.C. Docket No. 82-708

ROBERT JOHN WINICKI AND
ANDREW ALEXANDER STRAUSS,

Plaintiffs-Appellants,

versus

ROBERT A. MALLARD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

Before JOHNSON and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 13, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: April 4, 1986

APPENDIX C

Robert John WINICKI and Andrew Alexander Strauss, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

Robert A. MALLARD, individually and in his capacity as the Property Appraiser of Duval County, Florida, on behalf of himself and all others similarly situated; Lynwood Roberts, individually and in his capacity as the Tax Collector of Duval County, Florida, on behalf of himself and all others similarly situated; Randy Miller, individually and in his capacity as the Executive Director of the Department of Revenue of the State of Florida; Jim Smith, in his capacity as the Attorney General of the State of Florida, Defendants.

No. 82-708-Civ-J-16.

United States District Court,
M.D. Florida,
Jacksonville Division.

Aug. 16, 1985.

MEMORANDUM OPINION
AND ORDER

JOHN H. MOORE, II, District Judge.

This case was brought on July 7, 1982 by two Florida homeowners on behalf of themselves and all others similarly situated against Robert A. Mallard, individually and in his capacity as the Property Appraiser of Duval County, Florida; Lynwood Roberts, individually and in his capacity as the Tax Collector of Duval County, Florida; Randy Miller, individually and in his capacity as the Executive Director of the Department of Revenue of the

State of Florida; and Jim Smith, in his capacity as the Attorney General of the State of Florida. Both Defendants Robert A. Mallard and Lynwood Roberts are sued respectively as representatives of the 67 property appraisers and tax collectors in the various counties throughout the State of Florida. On September 28, 1984 the parties filed a stipulation dismissing Jim Smith as a defendant in this case. Plaintiffs have alleged that their Federal constitutional rights, namely their rights as secured by the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause of the Fifth and Fourteenth Amendments, and the Commerce Clause of the United States Constitution have been violated by Fla.Stat. § 196.031(3)(d)-(e) (the homestead tax exemption statute), and they seek redress pursuant to 42 U.S.C. § 1983. More specifically, Plaintiffs aver that the homestead tax exemption statute (the "Statute") which requires that a person reside in the State of Florida for five consecutive years prior to claiming an additional ad valorem homestead tax exemption impairs the fundamental right to travel from one state to Florida, creates two classes of residents in the State of Florida, those who have been residents for five consecutive years and those who have not, discriminates against older individuals who, because of their age, have a shorter expected life span and who move into the State of Florida for retirement, and restricts the movement of goods and persons among the states.

Plaintiffs originally sought a declaratory judgment that the Statute is in violation of the United States Constitution, an injunction prohibiting the Defendants from enforcing the consecutive five-year residency requirement,

and damages to the class for the resulting enforcement of the Statute and the inability of the class to claim the increased homestead exemption. For reasons that will become apparent below, Plaintiffs now seek only a declaration of the Statute's validity under the United States Constitution and an award of damages under § 1983 (Plaintiffs' response to Defendants' notice of supplemental authority, February 17, 1983).

The Statute

As chronicled by the Florida Supreme Court:

> [t]he home has a history of special significance in Florida law. Protection from the forced sale of homestead realty was part of the 1868 constitution (*see* art. X, § 1, Fla. Const. (1868)). In 1934, article X, section 7, as modified in 1938, was added to the then existing 1885 constitution to provide for a $5,000 homestead tax exemption similar to that of article VII, section 6(a), of the 1968 constitution. Although the forced sale exemption requires the claimant to be the head of a family and the tax exemption does not, both require the individual claiming the exemption to be a resident of Florida. (citations omitted)

Osterndorf v. Turner, 426 So.2d 539, 541 (Fla.1982).

The present controversy has its origins in 1980 when amendments to Article VII, § 6 of the state constitution were approved by Florida voters. On March 11, 1980, the electorate voted by special election to amend Article VII, § 6(c) and provide for an enhanced school district homestead exemption of $25,000 for school district ad valorem taxes. The enhanced exemption was to be implemented by general law and subject to the conditions of general law. On October 7, 1980, the voters approved Article VII, § 6(d) providing for a three-step enhanced homestead ex-

emption for non-school district ad valorem taxes. Once again, the exemption was to be implemented by general law and subject to conditions imposed therein.

Consistent with these public directives to implement the enhanced homestead tax provisions, the Florida Legislature enacted Section 196.031(3)(d) and (e) to read as follows:

> (d) For every person who is entitled to the exemption provided in subsection (1) and who has been a permanent resident of this state for the 5 consecutive years prior to claiming the exemption under this subsection, the exemption is increased to a total of $25,000 of assessed valuation for taxes levied by governing bodies of school districts.
>
> (e) For every person who is entitled to the exemption provided in subsection (1) and who has been a resident of this state for the 5 consecutive years prior to claiming the exemption under this subsection, the exemption is increased to a total of the following amounts of assessed valuation for levies of taxing authorities other than school districts: $15,000 with respect to 1980 assessments; $20,000 with respect to 1981 assessments; and $25,000 with respect to assessments for 1982 and each year thereafter.

At once the Statute came under constitutional attack by Florida homeowners who had resided in the state less than five years. Suits were filed in Volusia County (*Osterndorf v. Turner,* Case No. 81-260-CA-01, Division D); Duval County, (*Winnicki v. Mallard,* Case No. 82-3J-CA Division D); Pinellas County, (*Maguire v. Schultz,* Case No. 80-14147-14 and *Fesperman v. Schultz,* Case No. 82-7074-16); and in the Orlando Division of this federal district (*Osterndorf v. Turner,* 505 F.Supp. 175 (M.D.Fla. 1981)).

The *Osterndorf* state action eventually found its way to the Florida Supreme Court in late 1982. On December 16, 1982, the Supreme Court of Florida ruled that Section 196.031(3)(e), *Fla.Stat.*, violated the equal protection clause of the Florida Constitution. *Osterndorf v. Turner*, 426 So.2d 539 (Fla.1982). On rehearing on February 3, 1983, Section 196.031(3)(d), likewise was found unconstitutional for the same reasons expressed in the December opinion. By expunging the statutory language which required a homeowner to be a resident for five years before qualifying for the enhanced exemption, the Court's decision enabled approximately 300,000 taxpayers to claim the enhanced $25,000 exemption for the taxable year 1983.

The budgetary problems and administrative difficulties associated with a massive refund led the Court to conclude that no retroactive relief would be awarded except to those taxpayers who had "timely judicially challenged" the residency requirement in the Statute. *Osterndorf* at 545. This type of remedial calculation has precedent in the Florida Supreme Court, *Gulesion v. Dade County School Board*, 281 So.2d 325 (Fla.1973); and was followed in *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578 (Fla.1984). Only three individuals, it is suggested, were entitled to retroactive relief: Mr. Osterndorf, the plaintiff in *Osterndorf v. Turner;* Mr. Maguire, the plaintiff in *Maguire v. Schultz*, and Mr. Winicki, an amicus in *Osterndorf v. Turner*, one of the named Plaintiffs in this case and a plaintiff in the state action, *Winicki v. Mallard*.

Plaintiff, Winicki's State Action.

Winicki instituted his state action on January 4, 1982 against Mallard, Roberts and Miller, invoking the juris-

diction of the state court pursuant to Section 194.171, *Fla.Stat.*, which provides a civil remedy for a state taxpayer who wants to contest his ad valorem tax assessment. Winicki alleged that the Statute violated his rights under the Privileges and Immunities Clause and the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. He sought monetary and injunctive relief pursuant to 42 U.S.C. § 1983.

On March 22, 1982, the circuit court in Duval County, Florida granted a stay in Winicki's action pending the final disposition of both *Osterndorf v. Turner,* 411 So.2d 330 (Fla.App.1982), Fifth District Court of Appeal, and *Maguire v. Schultz,* 426 So.2d 1303 (Fla.App.1983), Second District Court of Appeal. On July 16, 1982, nine days after Winicki commenced this federal action, the First District Court of Appeal quashed the circuit court's order granting the stay and remanded the case for a determination on the merits. *Winicki v. Mallard,* 417 So.2d 742 (Fla. 1st DCA, 1982). Upon reconsideration on the merits, the state trial court held on September 29, 1982 that the Statute violated the "right to travel and equal protection of the laws under the United States Constitution," and permanently enjoined these defendants from enforcing the Statute. No award of damages was mentioned. On May 20, 1983, more than three months after the Florida Supreme Court resolved the issue of the Statute's constitutionality in *Osterndorf v. Turner, supra,* the First District Court of Appeal, per curiam, affirmed the state trial court's order of September 29, 1982 in a one-sentence opinion which read: "Affirmed on the authority of and for the reasons enunciated in *Osterndorf v. Turner*, 426

So.2d 539 (Fla.1983)." *Winicki v. Mallard,* 436 So.2d 926 (Fla. 1st DCA 1983).

The Instant Action

Amid the flurry of state judicial activity in 1982 concerning the Statute's constitutionality, the Plaintiffs, ROBERT WINICKI and ANDREW STRAUSS, on behalf of themselves and all others similarly situated, commenced this federal action on July 7, 1982. Despite the judicial repeal of the Statute in early 1983 and the formal legislative repeal of the Statute in 1984 (Section 2 of Laws 1984, Ch. 84-327), and notwithstanding their acknowledgement that the request for injunctive relief is moot, Plaintiffs have moved the Court for a declaration as to the federal constitutional validity of the Statute and for an order granting partial summary judgment in their favor on the issue of whether they are entitled to an award of monetary damages under § 1983 against the defendant classes represented by Mallard and Roberts.

Defendants have urged two grounds for dismissal: that this action is barred by the Tax Injunction Act, 28 U.S.C. § 1341; and that this § 1983 damages action is barred by the principles of comity as enunciated in *Fair Assessment in Real Estate Assoc., Inc. v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). The latter issue will be considered first.

The concept of comity between federal courts and state governments, referred to by many as "Our Federalism", represents:

> . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxi-

> ous though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

Nowhere is the principle of comity as particularly appropriate as in the area of state tax matters. As recognized by the United States Supreme Court less than one hundred years after our Nation's birth:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows v. City of Chicago, 11 Wall. 108, 110, 20 L.Ed. 65 (1870).

This notion of federal court restraint with the fiscal operations of state governments barred a taxpayer civil rights damages action under Section 1983 in *Fair Assessment in Real Estate Ass'n v. McNary, supra. Fair Assessment* involved a suit by taxpayers in St. Louis County, Missouri alleging that the county's tax assessors, supervisors, and director of revenue, along with three state tax commissioners, had deprived them of equal protection and due process of law by unequal taxation (assessment) of real property. Plaintiffs filed suit under 42 U.S.C. § 1983 and sought actual damages in the amount of over assess-

ment of their property as well as punitive damages against each of the public officials. As Justice Rehnquist, writing for the Court, observed:

> . . . despite the ready access to federal courts provided by *Monroe* [*v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)] and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court. (Footnote and citations omitted.)

Fair Assessment 454 U.S. at 116, 102 S.Ct. at 186.

Plaintiffs submit that comity should not bar the present action when the only issue presented is whether the state tax statute on its face violates the United States Constitution. They argue that a facial attack, unlike a challenge involving the application of a state tax statute, leaves nothing to defer to the state courts or state administrative proceedings. Thus, the policy rationale behind comity, a reluctance to interfere with state fiscal operations where the federal right may be preserved unimpaired, is simply not present. Plaintiffs point to footnote 4 of the *Fair Assessment* decision as evidence that the issue of whether comity bars a Section 1983 action which facially attacks a state tax statute was never specifically addressed by the Court and remains an open issue.

Footnote 4 of *Fair Assessment* reads in pertinent part:

> We need not decide in this case whether the comity spoken of would also bar a claim under § 1983 which

> requires no scrutiny whatever of state tax asssessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race.

Whatever doors Plaintiffs assert were left open by the *Fair Assessment* Court in the above-quoted passage, this Court now closes as to these Plaintiffs in this action. No assertion has been made in this case that the Statute was racially discriminatory. It must be remembered that Section 1983, although broad in language and application, was enacted in 1871 because of the conditions that existed in the post-Civil War South. *Wilson v. Garcia,* — U.S. —, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254 (1985). Moreover, Plaintiffs are diluting the clear message of *Fair Assessment* by such a textual reading of the footnote. The focus of whether comity bars federal court jurisdiction rests not on whether the state tax law is constitutionally challenged on its face or as applied, but rather on the concomitant respect that should be accorded state tax laws in federal court.

Upon a declaration that the Statute is facially invalid, Plaintiffs concede that a refund would have an impact on the fisc of the State of Florida. With a purported class of 300,000 individuals, a damage recovery could well exceed $150,000,000. A more chilling effect upon the fiscal operations of state government cannot be imagined.

Plaintiffs also contend that principles of comity are not applicable where, as here, Florida law cannot provide any plain, adequate and complete remedy. Except for three individuals, it is alleged that no monetary damages are available to the members of Plaintiffs' class to remedy the violation of their constitutional rights.

As the *Fair Assessment* Court noted:

> We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are "plain, adequate, and complete," as that phrase has been used in articulating the doctrine of equitable restraint, and those which are "plain, speedy, and efficient," within the meaning of the Tax Injunction Act. Both phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost. Numerous federal decisions have treated the adequacy of state remedies, and it is to that body of law that federal courts should look in seeking to determine the occasions for the comity spoken of today. (Citations omitted).

Fair Assessment, 454 U.S. at 116, n. 8, 102 S.Ct. at 186, n. 8.

In *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981), the Supreme Court had occasion to interpret the meaning of "plain, speedy and efficient" as it is used in the Tax Injunction Act, and concluded that a state court remedy was plain, speedy and efficient if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Rosewell,* at 514, 101 S.Ct. at 1230 (quoting *LaSalle National Bank v. County of Cook,* 57 Ill.2d 318, 324, 312 N.E.2d 252, 255-256 (1974). The term is to be construed narrowly. *California v. Grace Brethren Church,* 457 U.S. 393, 413, 102 S.Ct. 2498, 2510, 73 L.Ed.2d 93 (1982).

A review of available state remedies demonstrates that the Plaintiffs have a choice of remedies under Florida

law which are plain, adequate and complete. *See,* Ch. 194, *Fla.Stat.,* Administrative and Judicial Review of Property Taxes; Part I, Administrative Review § 194.011-194.042; Part II, Judicial Review §§ 194.151-194.231. Plaintiffs' allegation that their remedy is inadequate is in reality an argument that a better remedy would be available in the federal courts. But, "[n]either the judicial decisions nor § 1341 require that the state remedy be the best available or even equal to or better than the remedy which may be available in the federal courts." *Rodriguez v. Steirheim,* 465 F.Supp. 1191, 1193 (S.D.Fla.1979), *aff'd,* 609 F.2d 1007 (5th Cir. 1980); *citing Bland v. McHann,* 463 F.2d 21, 29 (5th Cir.1972).

In the present case there is nothing to indicate that Plaintiffs have suffered or will suffer from having to seek protection of their federal rights by state remedies. In general, the fervency displayed by Winicki in pursuing this action is matched only by the malaise exhibited by all the other Plaintiffs. Indeed, Plaintiff, STRAUSS, along with the multitude of Florida homeowners who never timely judicially challenged the defunct Statute, benefited from their inaction when the Florida Supreme Court blue-penciled the durational residency requirement from the Statute for the tax year 1983. Plaintiff, WINICKI, on the other hand raised federal constitutional objections to the Statute and received a full hearing and judicial determination in the Florida courts. As an amicus in *Osterndorf,* he was credited with a refund on his 1982 ad valorem taxes, the first year he was eligible to claim his property as a homestead under Florida law. In sum, Winicki asserted his federal rights, and obtained a plain, adequate

and complete remedy from which he could have secured review by the United States Supreme Court.

It is clear that Florida provides a plain, adequate and complete remedy to state taxpayers challenging state tax statutes. *Osterndorf v. Turner,* 505 F.Supp. 175, 176 (M. D.Fla.1981). While the remedial scheme contains a short sixty (60) day period for challenging the tax statute, the limitation is not unreasonable given the state's legitimate interest in sound fiscal administration.

The Defendants also argue that 28 U.S.C. § 1341 poses a jurisdictional bar to the present action. The Tax Injunction Act states simply that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Congress' express intent in the Act is clear: to limit drastically federal district court jurisdiction to interfere with so important a local concern as the operation of state tax systems if the taxpayer has available an adequate remedy in the state courts. Even though not prohibited by the statutory language, the Act has been held to bar federal district courts from issuing declaratory judgments holding state tax laws unconstitutional. *California v. Grace Brethren Church,* 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982).

In the aftermath of the *Osterndorf* decision in the Florida Supreme Court, Plaintiffs argue that the Tax Injunction Act issue is moot because the Statute has been enjoined, and even if the Act were to remain applicable, there is no longer any possibility that a "plain, speedy and efficient remedy exists in the state court since ap-

proximately 300,000 Floridians have been completely denied any monetary remedy. Defendants contend the Tax Injunction Act is still applicable and presents a bar to this action.

While the applicability of Section 1341 to this action may be suspect because of the present posture of this case (the Statute having been repealed), nevertheless a declaration providing for damages pursuant to Section 1983 would be tantamount to an injunction *ab initio*. No difference is perceived in ordering Defendants to refund the collected taxes from initially enjoining or restraining the collection of the taxes when the Statute was in force. As noted above, the taxpayers had a plain, adequate and complete remedy under State law. Thus, Section 1341 would have prohibited this Court from initially enjoining the Statute's application and likewise bars a belated, identical challenge after its repeal.

The question of whether the Tax Injunction Act standing alone would bar consideration of a taxpayer damage action brought under Section 1983 was left unresolved by the United States Supreme Court in *Fair Assessment. Fair Assessment* 454 U.S. at 107, 102 S.Ct. at 181. That is not to say, however, that this Court is writing on a clean slate. There is precedent in this circuit that taxpayers may not circumvent the jurisdictional bar of § 1341 by bringing a civil rights action under § 1983. *Bland v. McHann,* 463 F.2d 21 (5th Cir.1972); *cert. denied* 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973). In *Bland*, a § 1983 action was filed by black taxpayers charging that increases in their property tax assessments were solely

the result of racial discrimination and were in retaliation for peaceful protests against local merchants and municipal officials. The court held that in the clash between the two statutes, § 1341 should prevail. *See also, American Commuters Association v. Levitt,* 405 F.2d 1148 (2d Cir. 1969); *Gray v. Morgan,* 371 F.2d 172 (7th Cir.1966).

Accordingly, based on the principles of comity as expressed in *Fair Assessment, supra,* and on 28 U.S.C. §1341, this cause shall be dismissed.

IT IS ORDERED AND ADJUDGED:

That Defendants' motion to dismiss be and the same is hereby GRANTED, and this cause stands dismissed.

FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1789

In The

Supreme Court of the United States

October Term, 1985

ROBERT JOHN WINICKI and
ANDREW ALEXANDER STRAUSS,
on behalf of themselves and all others similarly situated,
Petitioners,

vs.

ROBERT A. MALLARD, individually and in his capacity as the Property Appraiser of Duval County, Florida,

on behalf of himself and all others similarly situated;

LYNWOOD ROBERTS, individually and in his capacity as the Tax Collector of Duval County, Florida,

on behalf of himself and all others similarly situated;

RANDY MILLER, individually and in his capacity as the Executive Director of the Department of Revenue of the State of Florida,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE PRINCIPLE OF COMITY BARS A TAXPAYER'S 42 U.S.C. § 1983 DAMAGE ACTION BROUGHT IN FEDERAL COURT CHALLENGING THE CONSTITUTIONALITY OF A STATE TAXING STATUTE WHEN THE TAXPAYER HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY IN STATE COURT?

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SUPPLEMENTAL STATEMENT OF THE CASE

The respondents, Robert A. Mallard, Property Appraiser of Duval County, Florida; Lynwood Roberts, Tax Collector of Duval County, Florida; and Randy Miller, Executive Director of the Department of Revenue of the State of Florida, supplement the petitioners' (or "taxpayers") Statement Of The Case with the following clarifications of petitioners' facts which more accurately describe the history of the litigation now before this Court:

1. On the defendants sued by taxpayers Winicki and Strauss: On July 7, 1982 Winicki and Strauss, and the class they purport to represent, sued Robert A. Mallard, Property Appraiser of Duval County, Florida, on the behalf of himself and all others similarly situated; Lynwood Roberts, Tax Collector of Duval County, Florida, on behalf of himself and all others similarly situated; Randy Miller, Executive Director of the Department of Revenue of the State of Florida; and Jim Smith, Attorney General of the State of Florida. Winicki v. Mallard, 783 F.2d 1567, 1568 (11th Cir. 1986). Attorney General Smith was later dropped from the suit, leaving the Duval County Property Appraiser and Tax Collector, and the Executive Director of the State Department of Revenue. Neither the plaintiff nor the defendant class was ever certified. Winicki v. Mallard, 615 F.Supp. 1244 (M.D. Fla. 1985).

2. With respect to the Tax Injunction Act issue: The United States Court of Appeals for the Eleventh Circuit stated that "[i]n view of our disposition of this case we need not reach the applicability vel non of the Tax Injunction Act." Winicki v. Mallard, 783 F.2d 1567, 1571 n. 2 (11th Cir. 1986).

3. On the litigants before the state court in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982): This was not a class action. The plaintiff/taxpayers were Richard J. Osterndorf and Pauline F. Osterndorf. Osterndorf v. Turner, 411 So.2d

330, 331-332 (Fla. 5th DCA 1982).

4. On the monetary relief granted by the state court in Osterndorf v. Turner: The Florida Supreme Court granted a tax refund to Richard and Pauline Osterndorf, the litigants before it, and to "any other litigants who have timely judicially challenged the statute." 426 So.2d at 545. The Osterndorf court did not name or limit by specific number the qualifying litigants.

5. On the lack of a ruling on the instant petitioners' federal claims: In the state court action styled Winicki v. Mallard, in which one of the instant class representatives, Robert John Winicki, was the only plaintiff, the state circuit court ruled on September 29, 1982 that the state taxing statute (called Homestead Exemption Statute by petitioners) violated the right to equal protection under the United States Constitution, Winicki v. Mallard, 615 F.Supp. 1244, 1246 (M.D. Fla. 1985). The defendants appealed. During the pendency of the appeal, the state supreme court held the taxing statute unconstitutional under the equal protection clause of the Florida Constitution; therefore, it did not address the statute's constitutionality under the equal protection clause of the fourteenth amendment and the privileges and immunities clause of the United States Constitution. Osterndorf v. Turner, 426 So.2d at 544. Shortly thereafter, the state appellate court in Winicki v. Mallard affirmed the state circuit court opinion holding the statute unconstitutional "on the authority of and for the reasons enunciated in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1983). Winicki v. Mallard, 615 F.Supp. at 1246. Later, when plaintiff Winicki sought an award of attorney's fees in state court, the Florida appellate court cited the previous state court holdings in Winicki v. Mallard, 436 So.2d 926 (Fla. 1st DCA 1983) and Osterndorf v. Turner, 426 So.2d 539 (1983), noting that both state courts ultimately relied on state grounds to invalidate the statute, and denied Winicki's state court request for attorney's fees. Winicki v. Mallard, 441

So.2d 693, 694 and 696 (Fla. 1st DCA 1983).

6. On the district court's dismissal of the petitioner/taxpayers' complaint and the application of the comity doctrine: The United States District Court for the Middle District of Florida (hereinafter "district court") dismissed the complaint because a review of available state remedies demonstrated that the taxpayers had a choice of remedies under Florida law which were "plain, adequate and complete," Winicki v. Mallard, 615 F.Supp. at 1248; because of the concomitant respect that should be accorded state tax laws in federal court," 615 F.Supp. at 1248; and, as petitioners state in their Statement of the Case at page 5, because of the "chilling effect" of such a refund "upon the fiscal operation of state government." Id.

7. On the court of appeals' findings in support of its affirmance of the district court: The United States Court of Appeals for the Eleventh Circuit (hereinafter "court of appeals") affirmed the district court for all of the following reasons: a finding that the instant taxpayers had a choice of plain, adequate and complete remedies in state court which they, with the exception of Mr. Winicki, did not pursue, Winicki v. Mallard, 783 F.2d 1567, 1570-1571 (11th Cir. 1986); a finding that damage actions, no less than injunctions, contesting state taxing statutes interfere with the rightful independence of state governments, 783 F.2d at 1571; a finding that principles of federalsim upon which the comity doctrine rests require federal court restraint where retroactive relief is being sought, relying on multiple United States Supreme Court decisions denying relief in comparable situations, 783 F.2d at 1571 n. 1; and a finding that a post hoc evaluation of the state's resolution of the controversial tax statute was not proper under the principles of comity. 783 F.2d at 1571.

8. On the collection of taxes under an "illegal" statute: The state taxing statute was found to be unconstitutional in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982), rehearing

denied, 426 So.2d 547 (Fla. 1983), and the durational residency requirement was expunged from the statute for the 1983 tax year. No taxing official collected the tax for the 1983 tax year or thereafter. Winicki v. Mallard, 615 F.Supp. at 1246.

9. On the availability of a state damage remedy (refund) to taxpayers and on the "refusal" of the federal courts to provide a forum for the instant taxpayers to litigate their right to a federal damage remedy under section 1983: In dismissing the instant taxpayers' actions, the federal courts have consistently and repeatedly found the state remedies to be plain, adequate and complete. Winicki v. Mallard, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985) [noting the state law provisions for administrative review, Sections 194.011 -194.032, Fla. Stat. (1981) and judicial review, Sections 194.171 - 194.231, Fla. Stat. (1981)], aff'd, 783 F.2d 1567, 1570-1571 (11th Cir. 1986) [reaffirming the availability of state remedies]; Osterndorf v. Turner, 505 F.Supp. 175, 176 (M.D. Fla. 1981). Moreover, petitioner/taxpayer herein, Robert John Winicki, has raised his constitutional objections to the statute by filing a Section 1983 damage action in state court on January 4, 1982. Class representative Winicki received a full hearing and a judicial determination in state court, and he received a refund of the taxes he contested. Winicki v. Mallard, 615 F.Supp. at 1246, 1249. (M.D. Fla. 1985).

SUMMARY OF THE ARGUMENT

Rule 17, Rules of the Supreme Court of the United States, prescribes the considerations governing discretionary review by petition for writ of certiorari. Although Rule 17 is not intended to be exclusive, it establishes a pattern which is constructive. To allow the writ, the Court must be persuaded that there is a conflict in the federal law or that there exists

an important, but unsettled, question of federal law which should be settled by the Court. The instant petitioner/ taxpayers cite no conflict in the law and demonstrate the existence of no important, but unsettled, question of law.

This Court in Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981) held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts," 454 U.S. at 116. The instant taxpayers' attempt to bring a § 1983 damage action in federal court challenging the constitutionality of a state taxing statute is barred by the principle of comity enunciated in Fair Assessment.

Taxpayers' efforts to avoid the holding in Fair Assessment by arguing that they have no plain, adequate and complete remedy in state court is spurious. Both the district court, Winicki v. Mallard, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985), and the court of appeals, Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir. 1986), determined that the complaining taxpayers had plain, adequate and complete remedies to redress the violation of their federal rights in state court. The failure of the purported taxpayer class to pursue their state court remedies does not render them any less sufficient under the law nor does it demonstrate any lack of a remedy. Winicki v. Mallard, 615 F.Supp. at 1249; Winicki v. Mallard, 783 F.2d at 1570-1571. There is no question that Florida courts provide plain, adequate and complete remedies for the protection of federal rights in state tax matters (See cases cited at page 11, supra.

Both the district court and the court of appeals properly concluded, on the facts and the law before them, that the doctrine of comity barred the petitioners' § 1983 action challenging the constitutionality of a state taxing statute in federal court. The petitioners have established no basis for this Court's exercise of its discretionary certiorari jurisdiction; therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

the United States Court of Appeals for the Eleventh Circuit should be denied.

ARGUMENT

In their jurisdictional statement petitioners invoke the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). (Petition for Writ of Certiorari at 2). Rule 17, Rules of the Supreme Court of the United States, prescribes the considerations governing review on certiorari, noting that such review is not a matter of right but of judicial discretion and will be granted "only when there are special and important reasons therefor." Further, Rule 17 provides a non-exclusive list indicating the character of reasons that will be considered when a petitioner seeks certiorari review. Essentially, the character of reasons enumerated in Rule 17 involves either a conflict between specified court decisions or the decision of an important question of federal law which has not been, but should be, settled by this Court.

In their discourse titled "Reasons for Allowing the Writ," the petitioner/taxpayers cite no decision which conflicts with that rendered by the Eleventh Circuit Court of Appeals in this action. Moreover, they establish no **important, but unsettled,** question of federal law that should be settled by this Court. Petitioners demonstrate no basis for this Court's exercise of its discretionary jurisdiction. In fact, the true issue presented for review engenders no "special and important reasons" for this Court to issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

In Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981), this Court held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." 454 U.S. at 116.

This holding controls the real issue presented in this cause, to wit:

> whether the principle of comity bars a taxpayer's 42 US.C. § 1983 damage action brought in federal court challenging the constitutionality of a state taxing statute when the taxpayer had a plain, adequate and complete remedy in state court?

The answer, in accord with Fair Assessment, is yes.

However, in order to circumvent the holding in Fair Assessment, taxpayers cite the "fundamental error" of the court of appeals, arguing that they had no available state damage remedy. (Petition for Writ of Certiorari at 7). This question has been decided by the district court. Winicki v. Mallard, 615 F.Supp. 1244, 1248 (M.D. Fla. 1985), and by the court of appeals, Winicki v. Mallard, 783 F.2d 1567, 1570-1571 (11th Cir. 1986), both of which concluded that there were plain, adequate and complete state remedies, which included the ability to obtain a damage award (a tax refund), available to taxpayers. The lower courts noted, however, that the instant taxpayers, with the exception of petitioner Winicki, did not pursue their state remedies. 615 F.Supp. at 1249; 783 F.2d at 1570-1571. In effect, petitioners seek a second right of appeal on an issue initially concluded against them by the district court and affirmed by the appellate court. Having no sufficient ground on which to invoke the discretionary jurisdiction of this Court, they rehash the merits of their claim.

In this endeavor, petitioners misrepresent the issue at hand, contending that their federal rights were foreclosed because "no state damage action is available." (Petition for Writ of Certiorari at 7). Not only did the two lower courts find that the taxpayers' state damage remedies were available and sufficient, both courts noted that some Florida taxpayers, including petitioner and class representative Winicki, pursued and obtained damage remedies (tax

refunds) after a full hearing and judicial determination of their rights in state court. Winicki v. Mallard, 615 F.Supp. at 1249; Winicki v. Mallard, 783 F.2d at 1570-1571.

Petitioners parade the unsubstantiated horribles that "a state is free to pass tax legislation which violates federal constitutional rights on a massive scale . . . without ever having to concern itself with the possibility of the imposition of a damage remedy . . . by a federal court or . . . by a state court." (Petition for Writ of Certiorari at 7). Such a disingenuous and inflammatory statement ignores, by choice, the tax refunds that were awarded to the litigants before the state courts. Osterndorf v. Turner, 426 So.2d 539, 545 (Fla. 1983).

In a similar and equally misleading vein, petitioners decry their inability to obtain a ruling from **any** court on the merits of their federal constitutional claims. (Petition for Writ of Certiorari at 7-8). Such a statement ignores the state circuit court opinion in Winicki v. Mallard where it was determined that the state taxing statute violated the "right to travel and the equal protection of the laws under the United States Constitution." Winicki v. Mallard, 615 F.Supp. at 1246 (quoting the opinion of the state circuit court). Further, such a statement eschews the obvious: with the exception of peititioner Winicki, the taxpayers herein **never** challenged the taxing statute in state court. 615 F.Supp. at 1249. Finally, and most significantly, this statement begs the question. The Florida Supreme Court found the durational residency requirement of the state taxing statute to be violative of the state constitution and expunged it from the statute permitting all state residents to enjoy the enhanced homestead exemption for the 1983 tax year and thereafter, Osterndorf v. Turner, 426 So.2d 539, 544-545 (Fla. 1983).

At length (Petition for Writ of Certiorari at 8-10), the instant petitioners recite the Court's decision in Fair Assessment regarding the principle of comity, but fail to appreciate the significance of the doctrine. These taxpayers

attempt to cut a hole in the Fair Assessment decision through which their § 1983 damage action based on the alleged unconstitutionality of the state tax statute can slip undeterred by the broad principles espoused by the Court in the Fair Assessment decision. They contend at page 10 of their petition that the Fair Assessment Court announced two impliedly exclusive requirements for the application of the comity doctrine in state tax matters: 1) there must be interference with state fiscal operations by suspending the collection of state taxes until the federal litigation is complete and 2) the federal right must be preserved. It is telling that no citation of authority follows the taxpayers' contention.

The Court in Fair Assessment did not establish such limited and exclusive requirements for the application of the principle of comity to state tax systems challenged in federal court. The so-called "requirements" are but two of the many historical considerations cited by the Court in its discussion of the development and application of federal comity to state tax matters. Other considerations enumerated include avoiding hauling state tax officers into court every time a taxpayer alleges a § 1983 violation, Fair Assessment at 115; and recognizing that the autonomy and fiscal stability of the state survives best when state tax systems are not scrutinized in federal courts, Id. at 114. These are a few of the basic historical considerations recommending the federal courts' exercise of restraint in state tax matters.

Nevertheless, taxpayers contend that because the state no longer collects the tax in question and suspension of same will be unnecessary, there is no interference with state fiscal operations which would trigger the application of the principles of comity. However, the potential intrusive effect on state fiscal operations from such a massive refund sought by these taxpayers on the state's autonomy and fiscal stability was well considered and underscored by the district court in its opinion at pages 1246 and 1248. Likewise, the Florida Supreme Court in Osterndorf v. Turner, 426 So.2d

539 (Fla. 1982), upon declaring the state tax statute here in question to be unconstitutional, also declined to grant statewide retroactive relief to persons not before the court and who had not timely judicially challenged the statute. It did so because of the potentially disastrous budgetary and adminstrative effect on state fiscal operations. Osterndorf, 426 So.2d at 545. Most significantly, the Eleventh Circuit court correctly recognized that the damages sought by petitioners are tax refunds collected under a state statute prior to its invalidation and concluded that even though a state tax statute has been declared unconstitutional and is no longer operational, the principles of federalism underlying the doctrine of comity require federal courts to show restraint where such retroactive relief is sought. 783 F.2d at 1571.

Similarly, taxpayers' reliance on the "requirement" of the preservation of federal rights is not supported by either the facts of law present here. The Fair Assessment Court held that comity bars taxpayers from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers, the Court concluded, must seek protection of their federal rights by state remedies, provided of course, that those remedies are plain, adequate and complete. Fair Assessment at 116. The Court equated the "plain, adequate and complete" remedies of which it speaks with those which are "plain, speedy and efficient" within the meaning of the Tax Injunction Act. Fair Assessment at 116 n.8.

Florida has a detailed statutory scheme providing for taxpayer remedies, (see Chapters 194 and 196, Florida Statutes) and disgruntled taxpayers can pursue their state and federal remedies in the state courts. See Chap. 86, Fla. Stats.; section 194.171, Fla. Stats., and see e.g., Winicki v. Mallard, Case No. 82-35-CA, Div. D. (4th Judicial Circuit, Jacksonville, Duval County, Fla. 1982), aff'd per curiam, 436 So.2d 926 (Fla. 1st DCA 1983); Arney v. State Dept. of Natural Resources, 448 So.2d 1040 (Fla. 1st DCA 1983); Penthouse, Inc. v. Saba, 399 So.2d 456 (Fla. 2d DCA 1981);

Metropolitan Dade County v. Wolff, 274 So.2d 584 (Fla. 3d DCA 1973), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973)[§ 1983 claims were asserted in each of these Florida courts]. The federal courts, in barring federal court review of Florida tax matters, have repeatedly held that Florida court remedies are adequate within the meaing of the Tax Injunction Act, 28 U.S.C. § 1341. E.g., Henry v. Metropolitan Dade County, 329 F.2d 780 (5th Cir. 1964); Carson v. City of Ft. Lauderdale, 293 F.2d 337 (5th Cir. 1961). Finally, as has been pointed out, class representative Winicki probably best exemplifies the adequacy of state court remedies.

What the instant petitioners misperceive is that federal rights are not lost when state courts invalidate state tax laws on state constitutional grounds. The loss, if not rectified, is the inability to be free of an unconstitutional deprivation of a federal right. That the right be restored or redressed is the focus, not the methodology. The history of petitioner Winicki's successful state court litigation demonstrates that federal rights can be preserved in state court and their violation redressed. Winicki v. Mallard, 615 F.Supp. at 1249.

The state court's resolution of the issue in Osterndorf v. Turner provided monetary damages to those before the state court and to those who had timely initiated state court action. It ultimately restored the alleged loss of federal rights to all taxpayers. The taxpayers who failed to avail themselves of adequate state remedies to redress their rights cannot now legitmately claim either a loss of a federal right or the unavailability of a state remedy. See Winicki v. Mallard, 783 F.2d at 1571.

Finally, petitioners futher attempt to restrict the significance of the principle of comity announced in Fair Assessment by their textual reading of footnote 4 of the decision (Petition for Writ of Certiorari at 12-13). They contend, on the basis of the footnote, that the comity doctrine applies only to situations where current operations of state

tax systems are being challenged. The comity doctrine as enunciated in Fair Assessment should not be so narrowly read. Winicki v. Mallard, 783 F.2d at 1571. Comity connotes a "proper respect for state functions." Fair Assessment, 454 U.S. at 112, citing Younger v. Harris, 401 U.S. 37, 44-45; 91 S.Ct. 746, 27 L.Ed.2d. 669 (1971). Even though federal court restraint in state tax matters is based in equity law, historical precedent demonstrates that the doctrine of equitable restraint (comity) was of notable application and carried peculiar force in suits challenging the constitutionality of state tax laws. Such restraint was particularly appropriate because of the delicate balance between the federal authority and the state governments, and the concomitant respect that should be accorded state tax laws in federal court. Fair Assessment, 454 U.S. at 108, citing Boise Artesian Water Co. v. Boise City, 213 U.S. 276, 281; 29 S.CT. 426; 53 L.Ed. 796 1909) and Matthews v. Rodgers, 284 U.S. 521, 525; 52 S.Ct. 217, 219; 76 L.Ed.447 (1932). The damages sought here are a refund of taxes collected under a state statute prior to its invalidation. The principles of federalism upon which the comity doctrine rests requrie federal courts to show restraint where retroactive relief is being sought. Winicki v. Mallard, 783 F.2d at 1571 n. 1 (citations omitted).

The district court and the court of appeals correctly recognized that this concomitant respect is the focus of whether comity bars federal court jurisdiction - not whether the state law is constitutionally challenged on its face or as applied. Winicki v. Mallard, 615 F.Supp. at 1248, aff'd, 783 F.2d at 1571. Both courts properly refused to engage in a post hoc evaluation of Florida's resolution of the controversial statute. 783 F.2d at 1571. In the critical area of state taxation, the proper relationship of the federal forum to the state is governed by the principle of comity. Id. The holding of this Court in Fair Assessment controls the instant action. The instant taxpayers **do not present** the exceptional claim described in the **obiter dictum** of footnote 4 in Fair

Assessment.

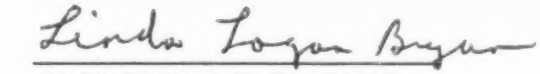
The Eleventh Circuit committed no "fundamental error" as petitioners urge at page 7 of their petition. Instead, the instant taxpayers misunderstand the doctrine of comity. In the instant case, taxpayer and class representative Winicki exemplifies the ability of a state taxpayer, allegedly deprived of federal constitutional rights, to preserve his federal rights through state court remedies. That the class of taxpayers Winicki and Strauss purport to represent have not pursued their state court remedies is of no consequence in the proper application of the principle of comity in the case **sub judice.** The court of appeals correctly held that the doctrine of comity, as expressed in Fair Assessment and derived from the extensive body of law on which the Fair Assessment opinion was based, bars the instant 42 U.S.C. § 1983 damage action challenging the constitutionality of a state taxing statute in federal court.

In exercising the judicial discretion imparted in Rule 17, the Court must determine that there are "special and important reasons" for granting a writ of certiorari. There are none here. Moreover, this Court may take into consideration that a state has already rectified an alleged unconstitutional action, Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 76-77; 99 L.Ed. 897, 901-902 (1954), and that this Court does not sit simply for the benefit of the particular litigants. Rice, 349 U.S. at 74; 99 L.Ed. at 901. Both considerations are proper in the instant case. The instant litigants have established no basis for this Court's exercise of its discretionary certiorari jurisdiction in this cause.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been furnished to **Robert John Winicki, Esquire,** Post Office Box 4099, 100 Laura Street, Jacksonville, Florida, 32201,.by U.S. mail this 27th day of June, 1986.

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Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1789

In The
Supreme Court of the United States
October Term, 1985

ROBERT JOHN WINICKI and
ANDREW ALEXANDER STRAUSS,

on behalf of themselves and
all others similarly situated,

Petitioners,

vs.

ROBERT A. MALLARD, individually and in his capacity as the Property Appraiser of Duval County, Florida,

on behalf of himself and all other similarly situated;

LYNWOOD ROBERTS, individually and in his capacity as the Tax Collector of Duval County, Florida,

on behalf of himself and all other similarly situated;

RANDY MILLER, individually and in his capacity as the Executive Director of the Department of Revenue of the State of Florida,

Respondents.

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

THE PROSPECTIVE RULING OF THE FLORIDA SUPREME COURT IN OSTERNDORF V. TURNER, 426 So.2d 539 (Fla. 1982) ELIMINATED THE TAXPAYERS' STATE REMEDIES.

The Counties assert in their answer brief that "[t]he failure of the purported taxpayer class to pursue their state court remedies" should bar the Taxpayers from obtaining a federal damage remedy under 42 U.S.C. § 1983. According to the Counties, "[t]here is no question that Florida courts provide plain, adequate and complete remedies for the protection of federal rights in state tax matters." The Counties do not mention that the prospective ruling of the Florida Supreme Court in *Osterndorf v. Turner,* 426 So.2d 539, 545 (Fla. 1982), *eliminated* all state remedies which had been available to the Taxpayers under Florida law.

The *Osterndorf* decision held the Homestead Exemption Statute unconstitutional only on a prospective basis beginning with the *Taxable* year commencing January 1, 1983. *Id.* This meant that the Counties continued to collect 1982 taxes, which were not due until April 1, 1983 (*see* Fla.Stat. § 197.012 (1981)), for months after the date of rendition, December 16, 1982, of *Osterndorf.* Yet, under *Osterndorf,* the Taxpayers had absolutely no state remedy to prohibit continued collection of 1982 taxes which totaled in excess of one hundred million dollars. In addition, the Taxpayers could not obtain a refund of 1980 and 1981 taxes which totaled in excess of two hundred million dollars.

In *Osterndorf,* the Florida Supreme Court made the conscious decision to deny the Taxpayers state remedies which were available under Florida law in order to allow the continued collection and retention of the illegal taxes by the Counties. Only three taxpayers (all attorneys), who had filed lawsuits prior to the rendition of *Osterndorf,* received refunds amounting to a total of less than $5,000 due to an exception in the prospective ruling. This exception was granted by the Florida Supreme Court to the litigant attorneys as a device to avoid review by this Court of the federal issues presented, but not decided, in *Osterndorf.* The remainder of the approximately three hundred thousand Taxpayers were unable to pursue state remedies which had been available to them before Osterndorf.

In conclusion, the Florida Supreme Court in *Osterndorf* eliminated all state remedies available to the Taxpayers. The only reason for the prospective ruling by the Florida Supreme Court was to remove state remedies which the Counties and the Florida Supreme Court knew were available to the Taxpayers and would have been pursued by them. The Counties' and the Florida Supreme Court's fear of the Taxpayers' pursuit of state remedies resulted in their elimination.

Respectfully submitted,

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